Supreme Court, U.S.
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No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1996

LINDA WILLIAMS, *Petitioner,*

v.

AVNET, INC., CHANNEL MASTER COMMUNICATIONS, INC., and CHANNEL MASTER SATELLITE SYSTEMS, INC., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BURTON CRAIGE
Patterson, Harkavy & Lawrence, L.L.P.
Post Office Box 27927
Raleigh, N.C. 27611
Telephone: (919) 755-1812

Counsel of Record for Petitioner

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QUESTION PRESENTED

Does the Americans with Disabilities Act require a court, when evaluating a claim that an individual has a "disability," to make an individualized determination of whether the impairment at issue substantially limits the individual's ability to work?

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Petitioner Linda Williams respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceedings on November 27, 1996.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of North Carolina (Boyle, J.) is reported at 910 F. Supp. 1124 (E.D.N.C. 1995). The opinion is reprinted in the appendix, p. A-1, infra.

The opinion of the Court of Appeals for the Fourth Circuit (per curiam) is reported at 101 F.3d 346 (4th Cir. 1996). The opinion is reprinted in the appendix, p. A-25, infra.

JURISDICTION

The Court of Appeals for the Fourth Circuit rendered its opinion on November 27, 1996, affirming the district court's decision granting summary judgment for respondent. Petitioner filed a timely petition for rehearing, which the Fourth Circuit denied on December 23, 1996.

This Court has jurisdiction to review the judgment below pursuant to 28 U.S.C. § 1254(1).

STATUTE AND REGULATION INVOLVED

42 U.S.C. § 12102(2):

> The term "disability" means, with respect to an individual –
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

---

29 C.F.R. § 1630.2(j):

> (j) *Substantially limits* – (1) The term *substantially limits* means:
>
> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of *working* -

(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

STATEMENT OF THE CASE

Petitioner has a permanent back impairment that prevents her from lifting more than twenty-five pounds. The Court of Appeals declared "as a matter of law" that a twenty-five pound lifting restriction "does not constitute a significant restriction on one's ability to . . . work."

(A-31) As a result, the court ruled that petitioner does not have a disability within the meaning of the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq., and is not entitled to the Act's protection. (A-33)

The decision below conflicts with the decisions of other circuit courts, which have consistently held that the determination of whether an impairment "substantially limits" a major life activity must be made on a case-by-case basis. The decision also conflicts with the plain language of the ADA and its implementing regulations, which require an individualized assessment of disability.

Petitioner, a punch press operator in respondent's manufacturing plant, injured her back in an accident unrelated to her employment. (A-2; A-27) Her orthopedist assigned a 5% permanent partial disability of the back and instructed her to avoid lifting over twenty-five pounds and heavy pushing and pulling. (A-27) Respondent terminated petitioner because of her impairment. (A-28-29, n.1)

Petitioner's medical restrictions on heavy lifting, pushing and pulling would have prevented her from performing her punch press operator job unless respondent made some accommodation. (A-27-28) The medical restrictions also excluded her from a broad range of other positions at respondent's plant,[1] and virtually all jobs outside

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[1] E.g., Machine Operator II (lifting up to 65 pounds) (J.A. 122); Machine Operator III (pushing 360-pound spool) (J.A. 123); Machine Operator IV (lifting up to 40 pounds) (J.A. 124); Machine Operator V (50 pounds) (J.A. 125); Painter I (35 pounds) (J.A. 126); Clerk H-II (35 pounds) (J.A. 127); Assembler III/Binding (45 pounds) (J.A. 128); Paint Line Hanger (50 pounds) (J.A. 129); Packer I (heavy lifting) (J.A. 130).

the plant that require a strength rating higher than "light work."[2]

Petitioner brought an action for discrimination in employment under the Americans with Disabilities Act ["the ADA"].[3] The district court granted respondent's motion for summary judgment.

In a per curiam opinion, the Court of Appeals for the Fourth Circuit affirmed. The court determined that petitioner failed to establish that she had a "disability" within the meaning of the ADA. Without discussing the effect of petitioner's impairment on her, the panel disposed of petitioner's claim in a single sentence:

> Like the Eighth Circuit, we hold, as a matter of law, that a twenty-five pound lifting limitation – particularly when compared to an average person's abilities – does not constitute a significant restriction on one's ability to lift, work, or perform

---

[2] The definitions of "sedentary," "light," "medium," and "heavy" work are codified in federal regulations for determining Social Security disability, 20 C.F.R. § 404.1567. A restriction to sedentary and light work has an enormous impact in industrial employment. For example, the Department of Labor's Dictionary of Occupational Titles places petitioner's job as punch press operator in the "punching and shearing" occupational category. Dictionary of Occupational Titles (4th ed. 1991), Vol. I, § 615 at 545. Twenty-four of the twenty-seven job classifications in that category have "medium" or "heavy" strength ratings. Id. at 545-47. Petitioner's impairment, restricting her to "sedentary" or "light" work, thus bars her from performing almost 90 percent of the jobs in her field.

[3] The district court had jurisdiction in the first instance under 28 U.S.C. § 1331 and 42 U.S.C. § 12117(a), incorporating by reference 42 U.S.C. § 2000e-5(f)(3).

any other major life activity. See Aucutt v. Six Flags Over Mid-America, 85 F.3d 1311, 1319 (8th Cir. 1996) (twenty-five pound lifting restriction did not "significantly restrict" major life activities).

(A-31)

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THE PLAIN LANGUAGE OF THE STATUTE.

Petitioner has a permanent back impairment that prevents her from lifting more than twenty-five pounds, and from heavy pushing and pulling. As part of her prima facie case, petitioner was required to show that her impairment constitutes a "disability" within the meaning of the Act. Section 12102(2) of the ADA states that

> The term "disability" means, with respect to an individual –
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (emphasis added).

The plain language of § 12102(2) requires that a finding of disability be made on an individual basis. The statute specifically defines the term "disability" "with respect to an individual." The individualized focus is reinforced by the requirement that the underlying impairment substantially limit a major life activity "of such individual." When the Court of Appeals below declared, "as a matter of law," that a twenty-five pound lifting limitation "does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity," it failed to conduct the individualized assessment that the statute requires.

The applicable federal regulations reinforce the statutory mandate that determinations of disability be made on a case-by-case basis. With respect to the major life activity of working, the regulation defines the term "substantially limits" as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3) (emphasis added).

Petitioner has spent almost her entire working life in a factory performing manual tasks. Her training and experience equipped her to use tools and machines in an industrial environment. The issue under the ADA is whether a twenty-five pound lifting restriction would significantly restrict employment opportunities for petitioner, not whether it would curtail opportunities for individuals, such as office workers, who rarely, if ever, are required to perform strenuous manual tasks. By ignoring differences in employees' "training, skills and abilities," the Court of Appeals failed to perform the individual assessment that the Act required.

The effect of the decision below goes far beyond this employee and this employer. By holding, as a matter of law, that a twenty-five pound lifting restriction is not a disability within the meaning of the ADA, the Court of Appeals, in one sentence, removed thousands of individuals with permanent back impairments from the Act's protection. For the worker on a construction site or factory floor, a twenty-five pound lifting restriction dramatically diminishes the range of possible jobs. In the Fourth Circuit, employers now have free rein to fire those workers without considering any accommodation of their medical condition. The Court of Appeals' mass burial of disability discrimination claims undermines the Act's broad remedial purpose.

An erosion of the requirement that courts make individualized determinations of disability unfairly burdens employers and employees. Employers will be compelled to make accommodations for employees who have an impairment that a court has deemed to be a disability as a matter of law, even though the impairment does not significantly restrict the particular employee's ability to work. Similarly, employees will be excluded from the protection of the Act because a distant court, with no knowledge of the impact of the impairment on the individual, has declared that the impairment does not constitute a disability.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS IN OTHER CIRCUITS.

The other circuits have consistently held that a determination of disability must be made on an individualized case-by-case basis. See, e.g., Katz v. City Metal Co., Inc., 87 F.3d 26, 32 (1st Cir. 1996). ("The determination of whether an impairment substantially limits

a major activity must be made on an individual basis."); Homeyer v. Stanley Tulchin Associates, Inc., 91 F.3d 959, 962 (7th Cir. 1996) ("A determination of disability must be made on an individualized case-by-case basis."); Webb v. Garelick Manufacturing Co., 94 F.3d 484, 488 (8th Cir. 1996) ("A court must ask 'whether the particular impairment constitutes for the particular person a significant barrier to employment.'"). Cf. Oswalt v. Sara Lee Corp., 74 F.3d 91, 92 (5th Cir. 1996) ("We do not imply that high blood pressure in general can never be a 'disability,' as defined by the statute. We hold only that Oswalt failed to provide any evidence that his high blood pressure substantially limited a major life activity.") (emphasis in original).

Until the decision below, the Court of Appeals for the Fourth Circuit was in harmony with the other circuits. In Ennis v. National Association of Business and Educational Radio, the court declared: "We believe that the plain language of the provision [42 U.S.C. § 12102(2)] requires that a finding of disability be made on an individual basis." 53 F.3d 55, 59 (4th Cir. 1995) (Luttig, J.), (quoted in Runnebaum v. Nations Bank of Maryland, 95 F.3d 1285, 1290 (4th Cir. 1996) (Michael, J.)). See Forrisi v. Bowen, 794 F.2d 931, 933 (4th Cir. 1986) ("The inquiry is, of necessity, an individualized one.") (Wilkinson, J.) (Rehabilitation Act).

The only authority that the court below cited to support its decision is Aucutt v. Six Flags Over Mid-America, 85 F.3d 1311 (8th Cir. 1996). Contrary to the court's characterization, the Eighth Circuit did not "hold, as a matter of law, that a twenty-five pound lifting limitation" can never be a disability within the meaning of the ADA. Instead, the plaintiff's claim in Aucutt failed because he "presented no evidence suggesting that his medical problems 'substantially limit[ed]' one or more of his 'major

life activities.'" 85 F.3d at 1318. The plaintiff in Aucutt, a security guard at an amusement park, was not able to perform a "streams course," a mandatory employee obstacle course, without experiencing severe pain. The Court of Appeals correctly observed that "difficulty completing a 'streams course' hardly constitutes the requisite showing that his medical condition substantially limited his overall employment opportunities." Id. at 1319. The court continued: "We note, for example, that a 25-pound lifting restriction was the only medical limitation placed upon Aucutt's activities after hospitalization in July 1991." Id. In contrast to petitioner, Aucutt offered no evidence that the lifting restriction had any effect on his ability to work. In the absence of any evidence to support the "substantial limitation" requirement, the Eighth Circuit necessarily rejected Aucutt's claim of disability.

Webb v. Garelick Manufacturing Co., 94 F.3d at 484, an Eighth Circuit decision rendered after Aucutt, directly conflicts with the Fourth Circuit's decision. In Webb, the Court of Appeals properly noted that a "person's expertise, background and job expectations are relevant factors in defining the class of jobs used to determine whether an individual is disabled." Id. at 487. The court in Webb recognized that the fundamental inquiry is "'whether the particular impairment constitutes for the particular person a significant barrier to employment.'" Id. at 488 (emphasis added).

The ADA, enacted in 1990, has now generated hundreds of circuit court decisions. Until the present decision, however, no circuit has held a particular impairment not to be a disability as a matter of law, without evaluating the effect of the impairment on the individual. To resolve a conflict of the circuits on an issue that is basic to the Act's application, the Court should issue a writ of certiorari.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the decision by the Court of Appeals.

March 24, 1997

BURTON CRAIGE
Patterson, Harkavy & Lawrence, L.L.P.
Post Office Box 27927
Raleigh, N.C. 27611
Telephone: (919) 755-1812

Counsel of Record for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

LINDA WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	5:95CV108BO(1)
	)	
AVNET, INC., CHANNEL MASTER COMMUNICATIONS, INC., and CHANNEL MASTER SATELLITE SYSTEMS, INC.,	)	
	)	
Defendant.	)	

ORDER

This matter comes before the Court on defendant's motion for summary judgment. Plaintiff brought this action, alleging violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq., and the North Carolina Handicapped Persons Protection Act ("NCHPPA"), as well as wrongful termination in violation of public policy. The Court now allows defendant's motion for summary judgment for the reasons outlined below.[1]

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[1] Defendants Channel Master Communications and Channel Master Satellite Systems are apparently subsidiaries of defendant Avnet, hence reference to a single "Avnet" defendant throughout this opinion. The parties' dispute as to whether plaintiff was employed by the other two named defendants, or by another of Avnet's divisions known as "Channel Master," is irrelevant.

* * *

Summary judgment shall be granted when, viewing the facts in the light most favorable to the non-moving party, (1) there is no genuine issue of material fact, and (2) the moving party is entitled to summary judgment as a matter of law. Fed.R.Civ.P. Rule 56(c). The party bearing the burden of proof on an issue at trial must "designate 'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986) (citation omitted). Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 474 U.S. 242, 106 S.Ct. 2505 (1986).

Ms. Williams began her employment at Avnet's Smithfield, North Carolina, facility on February 18, 1983. Initially hired as a riveter, plaintiff was promoted over the years into other positions. Her last position at Avnet was one of manual punch press operator, a job that requires heavy pushing, lifting, and loading in the operation of a machine that fashions metal rods into antenna parts. The job requires frequent bending at the waist in order to pick up incoming rods and place them in the machine, and to remove completed rods from the machine's hopper. Completed rods must then be placed on a rack, or in barrels on this rack, and the full, heavy rack must then be pushed (usually by two machine operators) to another area on the shop floor. This job cannot be performed from a sitting position.

On March 26, 1992, plaintiff suffered severe injuries in an automobile accident unrelated to her job. Following unsuccessful chiropractic treatment, plaintiff sought help

from Dr. Tejpal Singh Dhillon, an orthopaedic surgeon. On April 16, 1992, Dr. Dhillon provided plaintiff a note for plaintiff to present defendant, indicating that she would miss work for three weeks. On May 6,1992, another note was issued, stating plaintiff would miss an additional month. On June 3, 1992, another note indicated plaintiff would need to miss another three weeks, and another note, on June 26, 1992, extended this period by another month. On July 17, 1992, a note explained that three more weeks were required, and four more weeks were required by a note on August 7, 1992.

On September 4, 1992, Dr. Dhillon issued a note stating plaintiff could return to work four days later, but with the following restriction: "Avoid lifting over 25 lbs. of weight - heavy pushing and pulling." On the same day, in connection with unrelated litigation arising from the automobile accident, Dr. Dhillon assigned the plaintiff a disability rating of 5% permanent partial disability of the back. However, Avnet was not informed of Dr. Dhillon's conclusion that plaintiff's injuries were permanent. The record also demonstrates that plaintiff herself did not know that her injury would be permanent until after she had been released by Avnet.

In September, 1992, defendant received another note from Dr. Dhillon, dated September 10, 1992, stating plaintiff could return to work on October 5, 1992. This note did not indicate any restrictions. However, when plaintiff met with Avnet's personnel coordinator on October 2, 1992, she presented yet another note from Dr. Dhillon, dated the previous day, which re-stated the twenty-five pound limitation on lifting as a medical restriction. The parties dispute what was said at the meeting, but there is no dispute that plaintiff was removed from the payroll immediately after the meeting.

Avnet has a policy of granting employees disabled by non-occupational injuries a medical leave of absence of up to six months, providing such employees are able to return to work without restrictions. If the disability turns out to be a permanent one, the company attempts to accommodate the employee by finding another position within the company that would not violate the medical restrictions. Avnet released plaintiff pursuant to this policy, on the grounds that she could not return to her former position without restrictions, and that no positions for which plaintiff was qualified, given her disability, were available.

Plaintiff maintains that she can perform her job at Avnet if she is provided a "towmo," or forklift, with which to move the heavy racks and barrels. Plaintiff's supervisor informed her that arranging for a forklift and operator would be prohibitively expensive on a short term basis, if not physically impossible. The plant's Human Resources Manager testified that in order to give Ms. Williams a forklift, the entire production line, including approximately twelve machines, would have to be re-organized, and that even with this substantial re-arrangement, it is unlikely that there would be room to use an additional forklift.

The Americans with Disabilities Act

"In order to establish a violation of [the ADA], a plaintiff must prove: (1) that he has a disability; (2) that he is otherwise qualified for the employment or benefit in question; and (3) that he was excluded from the employment or benefit due to discrimination solely on the basis of the disability." Doe v. University of Maryland Medical System Corp., 50 F.3d 1261 (4th Cir. 1995).

I.

Plaintiff has suggested that Avnet's medical leave and disability policy constitutes an illegal discriminatory practice. This Court does not agree.

"[A]n individual is not otherwise qualified if he poses a significant risk to the health or safety of others by virtue of the disability that cannot be eliminated by reasonable accommodation." Doe, 50 F.3d at 1265; 42 U.S.C. §§ 12111(3), 12113(a)-(b); see also School Bd. of Nassau County v. Arline, 480 U.S. 273, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987) (contagious disease may disqualify person from employment). Because the safety demands of some jobs require unrestricted performance abilities, an employer's policy barring an employee from returning to work after a medical leave unless that employee is free of all restrictions can never be a per se violation of the ADA.

In many cases, it might well be negligent not to adopt such a policy where the job's performance could pose a danger to the worker and to others if not executed by a fully capable individual. See Reigel v. Kaiser Foundation Health Plan of N.C., 859 F. Supp. 963, 974 (E.D.N.C. 1994) (ADA cannot punish medical group for firing disabled doctor where plaintiff "cannot safely and properly perform the duties-required of that position"); Doe, supra (same: HIV-positive surgeon may be barred from operating on patients despite estimated small risk); Myers v. Hose, 50 F.3d 278 (4th Cir. 1995) (ADA cannot punish county for firing bus driver who failed health requirements due to uncontrolled diabetes and a severe heart condition).

Safety concerns aside, medical restrictions may still be considered by an employer in deciding whether or not to re-instate an employee returning from disability leave. The

concept of "returning to" something, such as a job, embodies the idea that one will resume the status quo ante, and henceforth be at the exact same location, or do or experience the exact same thing. If one attempts to "return," but is encumbered by medical restrictions, a presumption arises that one is not capable of "returning" in the full and honest sense of the word. Medical restrictions are thus highly relevant to the question of whether an employee has a colorable claim under the ADA.

II.

Absent direct evidence of discrimination, plaintiffs under the ADA must prove their case under the inferential proof scheme of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 778 (1973). Ennis v. National Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55 (4th Cir. 1995). Because plaintiff has not introduced direct evidence of discrimination, the McDonnell-Douglas scheme must be applied.

The familiar inferential-proof framework requires that plaintiff first establish a prima facie case of discrimination. "While the burden is 'not onerous,' it is also not empty or perfunctory. Plaintiff's evidence must be such that, if the trier of fact finds it credible, and the employer remains silent, the plaintiff would be entitled to judgment as a matter of law. Ennis, 53 F.3d at 59 (citation omitted).

If plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a valid reason for dismissal which, if believed, would establish that discrimination was not the motive for the defendant's action. This burden of defendant's is one of production, and does not operate to relieve discrimination plaintiffs of

their ultimate burden of proof. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); Williams v. Cerberonics, Inc., 871 F.2d 452, 456 n.2 (4th Cir. 1989). "If the defendant meets this burden of production, the presumption created by the prima facie case 'drops out of the picture,' and the plaintiff bears the ultimate burden of proving that she has been the victim of intentional discrimination." Ennis, 53 F.3d at 58, citing St. Mary's Honor Ctr. v. Hicks, ____ U.S.____, ____, 113 S.Ct. 2742, 2746-49, 125 L.Ed.2d 407 (1993).

III.

To satisfy the prima facie requirements "in a typical discharge case brought under the ADA, a plaintiff must prove by a preponderance of the evidence that (1) she was in the protected class; (2) she was discharged; (3) at the time of the discharge, she was performing her job at a level that met her employer's legitimate expectations; and (4) her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination." Ennis, 53 F.3d at 58 (citation omitted).

Plaintiff has established the second prong of her prima facie case - the fact of her discharge - but has otherwise failed to prove that she was in the protected class, was performing her job in an adequate fashion, and that the circumstances of her discharge raise an inference of unlawful discrimination.

A.

The first prong of a prima facie case under the ADA is actually composed of two conflicting elements. In order to qualify as a member of the ADA's protected class,

plaintiff must establish that (1) her injury is serious enough so as to "generally foreclose" her from engaging in such work without a stated reasonable accommodation, and (2), that given such reasonable accommodation, she is "otherwise qualified" for the position.

The "general foreclosure" test has been a source of some confusion, as it is difficult to conceive of a set of circumstances where a person would be both "generally foreclosed" from, and still "otherwise qualified" for, the same employment. As noted by this Court's opinion in Everette v. Runyon, ____ F. Supp. ____ (E.D.N.C. 1995), the term "generally foreclosed" can be misleading, since anyone who is "generally foreclosed" from a line of work is, almost strictly by definition, unqualified. But when recalling that the "general foreclosure" requirement for inclusion in the ADA's protected class came out of a concern that a lax standard might result in statutory protection "be[ing] claimed by anyone whose disability was minor and whose relative severity of impairment was widely shared," Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986), it becomes clear that the Fourth Circuit intended to impose a strong variant of the "substantial impairment" test. After all, the "general foreclosure" from a line of employment must be the result of a "substantial limitation of a major life activity." Id.

Only those who are generally foreclosed from comparable work by virtue of (1) being denied a reasonable accommodation for their substantial disability, or (2) having their substantial disability perceived in an irrational manner, can state a claim for relief under the Act. Employers do not have to provide any accommodation for minor impairments that do not prevent the employee from finding comparable employment. Nor can employers be held liable for their irrational perception of a minor impairment that would not

likely be viewed in the same manner by comparable employers. And if the accommodation is unreasonable, or would not render the employee fully qualified for the position, then the employee has failed to state a claim under the Act.

B.

Thus, the Court must first consider whether the nature, extent, and severity of plaintiff's disability amount to a "substantial limitation of a major life activity" such that, without reasonable accommodation, she is "generally foreclosed" from pursuing similar work.

Although the testimony of plaintiff's surgeon regarding the disability has its origins in another trial, it is nevertheless binding upon plaintiff in this action. In Reigel, supra, this Court held that admissions of disability intended to secure insurance benefits will bind a plaintiff in a later action under the ADA. When the record clearly indicated an ADA plaintiff had represented to her various insurers that she could not work, the plaintiff was barred from claiming she was qualified for the job.

This principle is equally applicable in situations where the ADA plaintiff is claiming disability benefits not under an insurance policy, but by an action in tort. Ms. Williams could not initiate a lawsuit against another party to the automobile accident without identifying her damages. To the extent that she sought redress for a permanent partial five percent back disability, she is now held to have admitted to that particular disability. The question thus becomes whether or not this disability meets the "general foreclosure" test described above, and if so, whether or not plaintiff was "otherwise qualified" given a reasonable accommodation.

Plaintiff's orthopaedic surgeon, Dr. Dhillon, has found that plaintiff's five percent permanent partial back disability should preclude her from lifting over twenty-five pounds and heavy pushing and pulling. Plaintiff has testified that this injury causes her great pain and has diminished her quality of life. The Court has no reason to doubt the veracity of either plaintiff or her doctor, but their testimony does not establish the requisite "substantial impairment" of a "major life activity."

In determining whether a disability meets the "substantial requirement" test, the EEOC has suggested a Court should consider three factors: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2). Of course, these factors must be analyzed in light of the Fourth Circuit's stringent "general foreclosure" standard.[2]

As a matter of law, the Court finds that plaintiff's injury does not substantially impair a major life activity so as to generally preclude plaintiff from pursuing this line of work without accommodation. Accord Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994), cert. denied, ____ U.S. ____, 115 S. Ct. 1104 (1995) (9% permanent partial

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[2] The Code of Federal Regulations also suggests that a Court may consider factors relating to the plaintiff's geographical access, and the number and types of jobs available within that geographical area. 29 C.F.R. § 1630.2(j)(3)(ii). In any but the most rural and desolate of areas, accurate and comprehensive evidence of this type would be all but impossible to compile.

disability to right foot and 29% permanent partial disability to left foot, limiting standing, walking, and lifting, insufficient for ADA); Blanton v. Winston Printing Co., 868 F. Supp. 804 (M.D.N.C. 1994) (inability to run and impairment in ascending or descending stairs, insufficient for ADA). This finding is buttressed by plaintiff's testimony that she went on to perform similar tasks at a school cafeteria. (Williams Deposition, pp. 10-11, 198, 200).

C.

As an alternative basis for this decision, assuming plaintiff's injury is sufficiently serious to pass the general foreclosure test, this Court holds that plaintiff's proposed accommodations are not reasonable.

"Plaintiff bears the burden of demonstrating that she could perform the essential functions of her job with reasonable accommodation." Tyndall v. National Educ. Centers, 31 F.3d 209, 213 (4th Cir. 1994). "Reasonable" is a legal standard that requires firm judicial definition. There is a tendency for courts to be undisciplined in applying this legal standard. The meaning of "reasonable" within an ADA accommodation context, as evidenced by the decisions of the Fourth Circuit, is grounded in deference to an employer's expert business decision flowing from a presumption that people behave in an economically rational manner, and an understanding that the requirement of reason is a requirement of economic rationality. While it may sometimes be less expensive for a business to incur the cost of an unreasonable accommodation rather than risk a lawsuit under the ADA, this has never been the Act's purpose, and Courts should avoid encouraging the creation of such dilemmas by refusing to second-guess what is or is not a reasonable expense for a particular business to incur in order to maintain a particular employee. If the proposed

accommodation is not obviously reasonable, or if the reasonableness of the proposed accommodation is a matter of some serious dispute, courts should defer to the employer's business expertise.

In so defining "reasonable," this Court explicitly rejects the argument that cost is not the primary factor in establishing the propriety -of a mandate that an employer make a given accommodation. The Second Circuit's decision in Lyons v. Legal Aid Society, ____ F.3d ____, 1995 WL 638466 (2d Cir. 1995) is illustrative of the problems that develop when the reasonableness standard loses focus. In Lyons, a New York City attorney returning to work following an automobile accident found it uncomfortable to walk or use public transportation. She therefore sued her employer under the ADA, claiming an entitlement to at least one reserved parking space in lower Manhattan, at a cost of up to 26% of her total salary. The Second Circuit found the plaintiffs request could be reasonable, holding that "an accommodation may not be considered unreasonable merely because it requires the employer 'to assume more than a de minimis cost,' or because it will cost the employer more overall to obtain the same level of performance from the disabled employee." Lyons, ____ F.3d at ____, 1995 WL 638466 at *5 (citation omitted).[3]

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[3] The Lyons court based its decision on a belief that "It is clear that an essential aspect of many jobs is the ability to appear at work regularly and on time, and that Congress envisioned that employer assistance with transportation to get the employee to and from the job might be covered." Id., (citation omitted). The Fourth Circuit has rejected this argument. Tyndall v. National Educ. Centers, 31 F.3d 209, 213 (4th Cir. 1994).

This logic cannot be reconciled with the language of the Act, which speaks of "reasonable accommodation." If "reasonable" is not defined from an employer's economic point of view - and it certainly cannot be defined from the plaintiff's point of view, else it would be surplus language given a presumption that plaintiff would not file an unreasonable complaint (see Fed.R.Civ.P. Rule 11) - then the term merely authorizes the reviewing court to engage in a subjective, legislative exercise. It is thus not surprising that in Lyons, the court felt no need to explicitly offer an alternative standard for "reasonable."

Plaintiff relies heavily upon 42 U.S.C. § 12111(9), which sets forth examples of possibly reasonable accommodations. The section introduces the examples with the phrase: "The term 'reasonable accommodation' may include -" (emphasis added), and is thus merely suggestive; section 12111(9) has no force of law, and is not binding upon any court. What is or is not reasonable must be determined on a case-by-case basis. Ennis.

However, proceeding on a case-by-case basis does not permit reliance upon certain individual characteristics, the consideration of which courts have traditionally held to have no place in the pursuit of justice. Plaintiff makes much of the fact that Avnet is, allegedly, "the world's largest distributor of electronic components," (Plaintiff's Response Brief, p. 1), going so far as submitting a copy of Avnet's 1992 annual report as her Exhibit A. The implication is that Avnet could afford to accommodate her requests, and that Avnet's refusal to do so was thus unreasonable and discriminatory. This manner of argument is misplaced.

Courts are generally forbidden from considering a party's financial ability in assigning liability, and so in

considering whether or not an employer discriminated, courts cannot hold the defendant acted unreasonably due merely to a perception, however accurate, that the defendant is financially able. The reasonableness, and hence the legality, of a proposed course of action is never determined by a subjective opinion of the defendant's finances. It may well be that the employer could afford to maintain plaintiff at an expensive cost, but that does not mean that it would have been reasonable to do so. Avnet is entitled, as a matter of law, to the same opportunities to compete in the marketplace as are afforded any of its competitors, without regard to size or success. See, i.e. Myers, 50 F.3d at 283 ("Like any employer, the County must estimate ex ante the amount of paid leave per employee, per annum it can reasonably afford, and then plan its budget on that basis") (emphasis added). The holding in the Lyons decision that "the question of whether it is reasonable to require an employer to provide [an accommodation] may well be susceptible to differing answers depending on . . . the employer's geographic location and financial resources," Lyons, ____ F.3d at ____, 1995 WL 638466 at *5, is contrary to traditional notions of due process and equal protection.

2.

The Court now considers each of plaintiff's proposed accommodations, in turn, against the legal standard of "reasonable accommodation."

Plaintiff's suggestion that she be provided with a forklift is unreasonable as a matter of law. "Although the ADA requires an employer to make 'reasonable' accommodations for individuals who are qualified to perform the essential requirements of their employment, the statute cannot be construed to require an employer to make

fundamental or substantial modifications in its operations to assure every disabled individual the benefit of employment." Reigel, 859 F. Supp. at 973 (citation omitted).

Next, plaintiff claims that:

> It would have been a simple and reasonable accommodation to require that one of the men assist plaintiff and her co-worker in performing that task . . . they would have needed the assistance of a male employee for approximately three minutes. Providing that assistance five or six times a day would not have significantly disrupted the other tasks . . .

(Plaintiff's Response Brief, pp. 15-16). There is some suggestion by defendant that the forklift option is unreasonable because it would require the assignment of an additional forklift operator.

To the extent that an operator would need to be assigned to the requested forklift, or that others would be required to assist the plaintiff with the performance of her job, or even simply change their routines to accommodate the new floor plan, plaintiff's requests are clearly unreasonable as a matter of law. "[C]ourts have universally found that employers are not required to assign existing employees or hire new employees to perform certain functions or duties of a disabled employee's job which the employee cannot perform by virtue of his disability." Reigel, 859 F. Supp. at 973. "The law does not require an employer to hire two individuals to do the tasks ordinarily assigned to one." Id. Plaintiff's argument that accommodating her requests would not have been

"significantly disrupt[ive]" is exactly that type of opinion that is managerial in nature and thus cannot be enforced unless its truth is plainly obvious and no plausible reason might contradict it.

Finally, plaintiff complains that Avnet should have accommodated her disability by finding her another, more suitable position. Prior to the ADA's enactment, the Fourth Circuit held: "The case law is clear that, if a handicapped employee cannot do his job, he can be fired, and the employer is not required to assign him to alternative employment." Carter v. Tisch, 822 F.2d 465, 467 (4th Cir. 1987) (citation omitted). This remains a correct statement of law. Myers, 50 F.3d at 281 (standards under Rehabilitation Act and ADA are identical).[4] "This circuit has made it clear . . . that the duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position." Myers, 50 F.3d at 284 (citation

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[4] Plaintiff's argument that Myers is largely dictum because it adopted a Rehabilitation Act standard is clearly wrong. The questioned portion of Myers cannot be dictum, because it provided the specific basis for the Court's decision. The Court carefully explained its reasons in specifically holding standards under both acts are identical. Moreover, at least three other circuits have reached the same conclusion. Bolton, 36 F.3d at 943 (10th Cir.); Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 542 (7th Cir. 1995); McDonald v. Commonwealth of Pennsylvania, 62 F.3d 92 (3d Cir. 1995). Finally, as noted above, 42 U.S.C. § 12111(9) and its administrative interpretations do not "specifically define" anything, and thus do not establish any new standards that might be differentiated from those found in the Rehabilitation Act.

omitted). "[A]n employer is not required to find another job for an employee who is no longer qualified to perform the duties of the job previously held but discontinued by virtue of a disability, unless the employer normally provides such alternative employment under its existing policies." Reigel, 859 F. Supp. at 973 (citation omitted).

But even the "existing policies" language is of limited value after Myers. Although the record indicates that Avnet has a policy of considering disabled employees for alternative positions, it was nevertheless acting within its rights if, as plaintiff alleges, defendant violated that policy in denying plaintiff alternative employment. An employer's violation of its own policy does not, without more, constitute a violation of the ADA. "A particular accommodation is not necessarily reasonable, and thus federally mandated, simply because [an employer] elects to establish it as a matter of policy . . . [An employer's] alternative placement provision does not, therefore, reflect a national rule of reasonable accommodation." Myers, 50 F.3d at 284.

Plaintiff cites several cases that would contradict Myers on the question of whether re-assignment may be a reasonable accommodation under the ADA, and therefore holding that failure to re-assign a disabled employee may impose liability upon an employer. Of these cases, Benson v. Northwest Airlines, Inc., 62 F.3d 1108 (8th Cir. 1995) is clearly distinguishable as it represents a different approach to the ADA followed by the Eighth Circuit. Benson might very well be the law of the Eighth Circuit, but the Fourth Circuit has quite clearly expressed its rejection of that opinion's approach to the ADA.

The case of Vazquez v. Bedsole, 888 F. Supp. 727 (E.D.N.C. 1995) is of no precedential value. There,

contrary to the law in the Fourth Circuit, the Court relied upon § 12111(9) to conclude that an ADA plaintiff can establish a material issue of fact by claiming she was not re-assigned to another position. Vazquez, 888 F. Supp. at 731. Of course, section 12111(9)'s active verb is "may," and the Fourth Circuit has repeatedly (and properly) declined to adopt the statutory and interpretive suggestions as binding law. Consequently, the Fourth Circuit reached the conclusion directly opposite of Vazquez, and it bears repeating:

> This circuit has made it clear . . . that the duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position.

Myers, 50 F.3d at 284; see also Guillot v. Garrett, 970 F.2d 1320, 1326 (4th Cir. 1992); Carter, 822 F.2d at 467; Riley v. Weyerhaeuser, 898 F. Supp. 324, 329 (W.D.N.C. 1995); Carty v. Carlin, 623 F. Supp. 1181 (D.Md. 1985).

Obviously, this Court is bound by the decisions of the Fourth Circuit in Myers, Carter, and Guillot. Accordingly, Vazquez v. Bedsole, 888 F. Supp. 727 (E.D.N.C. 1995) cannot be relied upon as valid precedent.[5] It is never reasonable, under the ADA or any other law, to expect an employer to terminate or re-assign employees, or to create a "make-work" position, in order to accommodate a disabled employee.

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[5] Notably, the Western District's opinion in Riley, which evidences a familiarity with Vazquez, followed the Fourth Circuit precedent.

3.

In mandating that ADA accommodations be "reasonable," Congress expressed the view that no judge could be as knowledgeable about a particular employer's shop floor or market position as that particular employer. This Court cannot command Avnet to purchase an additional forklift, re-arrange the layout of its Smithfield operation, or alter the duties of its employees merely because Avnet is a large corporation, or because the plaintiff is a sincerely sympathetic figure, or on account of some real or perceived relationship between the parties in the social hierarchy.

D.

Because plaintiff's disability is not sufficiently substantial, and because the requested accommodations are unreasonable, plaintiff cannot establish that she falls within the ADA's protected class. The same facts which establish plaintiff is insufficiently disabled and not otherwise qualified make obvious the conclusion that the discharge did not occur under circumstances that raise a reasonable inference of unlawful discrimination. Finally, the facts clearly establish that at the time of the discharge, plaintiff was not performing her job at a level that met her employer's legitimate expectations.

Avnet is therefore entitled to summary judgment as a matter of law on plaintiff Is claim under the Americans with Disabilities Act.

The North Carolina Handicapped Persons Protection Act

The North Carolina Supreme Court has declared that the NCHPPA is narrower in scope than the ADA. Burgess v. Your House of Raleigh, 326 N.C. 205, 214, 388 S.E.2d 134 (1990). The difference in scope is notable, because it is based at least in part on the fact that federal handicap discrimination guidelines make reference to "working" as an impairable "major life activity," while the relevant North Carolina statute does not. Compare N.C. Gen. Stat. § 168A-3(4) with 29 C.F.R. § 1614.203(a)(3) (standards under Rehabilitation Act); see Burgess, 326 N.C. at 213-14.

This Court has recently had occasion to interpret the "major life activity" of "working," and concluded that such language is superfluous. In Everette v. Runyon, ____ F. Supp. ____ (E.D.N.C. 1995), the Court noted that it is impossible to be qualified for an employment while claiming a general foreclosure from a line of work due to a substantial inability to work. Disability claims based upon the "major life activity" of "working" are insufficiently specific, and thus do not afford an employer an opportunity to consider any accommodations. An employer could, in some situations, reasonably accommodate an employee's specific disability - such as hearing, walking, or seeing - but if the employee's case is based upon a generalized claim of "inability to work," federal law cannot punish an employer for not having accommodated such a vague "condition." While some courts might entertain claims under the "major life activity" of "working," this Court does not. Therefore, to the extent that the ADA might be considered to have a broader scope than the NCHPPA because it allows "working" disability, such arguments should be rejected.

To her credit, plaintiff has been specific in describing her disability – a 5% permanent partial disability to the back preventing lifting over twenty-five pounds, heavy pulling and pushing, and, by her testimony, excessive bending at the waist. Under the NCHPPA's standards, this disability does not represent a qualifying "handicap." In Gravitte v. Mitsubishi Semiconductor America, Inc., 109 N.C. App. 466, 428 S.E.2d 254, disc. rev. denied, 334 N.C. 163, 432 S.E.2d 360 (1993), the North Carolina Court of Appeals rejected as insufficiently disabling a back injury that warranted a medical restriction on lifting in excess of forty pounds, repetitive bending, and prolonged sitting or standing in one place. This Court is not prepared to suggest Gravitte would have been decided differently had the restriction been set fifteen pounds lower.

Plaintiff attempts to distinguish Gravitte by claiming that the back injury in that case impaired only the plaintiff's ability to work, whereas her own back injury also impacts generally on her quality of life by limiting her ability to engage in other specified activities unrelated to work. While plaintiff's inability to perform non-work related tasks evidences the extent of her injury, disability discrimination claims must be based solely on the injury's impact upon plaintiff's ability to work. The law is ultimately concerned with whether or not the plaintiff is generally foreclosed from similar employment, but otherwise qualified with reasonable accommodation. Even if, as plaintiff suggests, the NCHPPA is concerned primarily with whether or not a person is generally inconvenienced, the Gravitte court specifically held that the above-described back injury did not substantially impair those "essential tasks one must

perform on a regular basis in order to carry on a normal existence." Gravitte, 109 N.C. App. at 471.[6]

Even were plaintiff sufficiently disabled under the NCHPPA, the North Carolina Supreme Court would "look to federal decisions for guidance in establishing evidentiary standards and principles of law to be applied in discrimination cases." N.C. Dept. of Corrections v. Gibson, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983). As discussed above, federal decisions would suggest plaintiff's disability does not place her within the protected class, and would further establish that plaintiff's requested accommodations are not reasonable.

Defendant is therefore entitled to summary judgment against plaintiff on her cause of action under the NCHPPA.[7]

Wrongful Termination in Violation of Public Policy

North Carolina is an employment-at-will state that recognizes certain statutory and public policy exceptions. Coman v. Thomas Manufacturing Co., 325 N.C. 172, 175, 381 S.E.2d. 445 (1989). "[W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy." Ibid.; Amos v. Oakdale Knitting Co., 331 N.C. 348, 351, 416 S.E.2d 166 (1992) (citation omitted). Public policy does not proscribe bad

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[6] Plaintiff claims her inability to have normal relations with her husband is an actionable NCHPPA "major life activity" impairment. This argument was specifically rejected by the state Supreme Court. Burgess, 326 N.C. at 214.

[7] Plaintiff's failure to qualify under the NCHPPA precludes any discussion of defendant's statute of limitations claims.

faith termination. North Carolina does not recognize a cause of action for wrongful discharge in bad faith. Amos, 331 N.C. at 360.

Although an action for termination in contravention of public policy need not necessarily be . exclusive of other available remedies, Amos, 331 N.C. at 356, the only public policy plaintiff might claim was violated by her termination concerns disability discrimination. Because plaintiff has not established that she suffered illegal discrimination, she cannot claim that her termination violated the public policy against such discrimination.

The defendant is entitled to summary judgment against plaintiff on her claim of wrongful termination.

SO ORDERED.

This 7th day of December, 1995.

/s/
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

I certify the foregoing to be a true and correct copy of the original.
Clerk
United States District Court
Eastern District of North Carolina

By /s/
REBECCA BOWEN, Deputy Clerk

United States District Court
Eastern District of North Carolina

LINDA WILLIAMS,
Plaintiff,

v. **Judgment in a Civil Case**
Case Number: 5:95-CV-108-BO(l)

AVNET, INC., CHANNEL MASTER COMMUNICATIONS, INC., and CHANNEL MASTER SATELLITE SYSTEMS,INC.,
Defendants.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendant is entitled to summary judgment against the plaintiff on her claim of wrongful termination and this action is hereby DISMISSED.

JUDGMENT FILED AND ENTERED THIS 11TH DAY OF DECEMBER 1995, AND COPIES MAILED TO:

Burton Craige, Esq.
P. 0. Box 1288
Raleigh, NC 27602

Martin Nesbit Erwin, Esq.
P. 0. Box 21927
Greensboro, NC 27420

December 11, 1995

DAVID W. DANIEL, CLERK
By: /s/
Rebecca Bowen, Deputy Clerk

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LINDA WILLIAMS, *Plaintiff-Appellant,*	)	
v.	)	
AVNET, INC., CHANNEL MASTER COMMUNICATIONS, INC., and CHANNEL MASTER SATELLITE SYSTEMS, INC., *Defendants-Appellees.*	)	No. 96-1072
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; EQUAL EMPLOYMENT ADVISORY COUNCIL, *Amici Curiae.*	)	

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Terrence W. Boyle, District Judge.
(CA-95-108-5-BO)
Argued: September 23, 1996
Decided: November 27, 1996

Before HALL, WILLIAMS, and MOTZ, Circuit Judges.

Affirmed by published per curiam opinion. Judge Williams concurred in part and wrote a separate concurring opinion.

COUNSEL

ARGUED: Burton Craige, PATTERSON, HARKAVY & LAWRENCE, L.L.P., Raleigh, North Carolina, for Appellant. Robert John Gregory, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington D.C., for Amicus Curiae EEOC. Martin Nesbitt Erwin, SMITH, HELMS, MULLISS & MOORE, L.L.P., Greensboro, North Carolina, for Appellees. **ON BRIEF:** John J. Korzen, SMITH, HELMS, MULLISS & MOORE, L.L.P., Greensboro, North Carolina, for Appellees. C. Gregory Stewart, General Counsel, Gwendolyn Young Reams, Associate General Counsel, Vincent Blackwood, Assistant General Counsel, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Amicus Curiae EEOC. Douglas S. McDowell, Ann Elizabeth Reesman, Ellen Duffy McKay, MCGUINNESS & WILLIAMS, Washington, D.C., for Amicus Curiae Advisory Council.

OPINION

PER CURIAM:

Linda Williams appeals the district court's grant of summary judgment to her employer on her claims for employment discrimination under the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12101 - 12213 (1995), and the North Carolina Handicapped Persons Protection Act (NCHPPA), N.C.G.S. § 168A (Michie 1987), and for wrongful discharge under state common law. *See Williams v. Avnet,* 910 F. Supp. 1124 (E.D.N.C. 1995). We affirm, albeit on narrower grounds than those on which the district court relied.

I.

The facts in this case are largely undisputed. In 1985, Linda Williams began working for Avnet, Inc.'s subsidiary, Channel Master Communications, in its Smithfield, North Carolina plant. In March 1992, Williams injured her neck and back in an automobile accident unrelated to work. Following the accident, Williams was unable to work for several months. During this period she visited her doctor every three to four weeks, each time receiving a note excusing her from work until the next appointment. After each visit, Williams submitted the doctor's note to the plant nurse, who extended her disability leave accordingly.

In September 1992, Williams' orthopedist told her that she could return to work, with the restrictions that she refrain from lifting more than 25 pounds and pushing or pulling heavy objects. The doctor rated her impairment as a 5% permanent partial disability of the back. Despite her doctor's rating, it appears that neither Williams nor her employer knew at that time that her disability would be permanent.

When Williams received medical permission to work, she asked her employer, Channel Master, if she could return to the plant in any job position that fit her medical restrictions, even in a job at less pay. A personnel coordinator informed her that she would not be permitted to return to work until her doctor released her from "any and all restrictions" and she could perform all the duties she had before the accident. Later, discovery revealed that there were several job vacancies at the plant during this period of time that would have satisfied Williams' medical restrictions. After her employer refused to reassign her to lighter duty work, Williams suggested other accommodations that Channel Master could make that

would enable her to continue to perform the job she had held at the time of the accident. Channel Master refused to accommodate Williams' condition in any way, and on October 2, 1992, after she had received six months of disability leave, the company terminated her.

Williams then filed a timely charge of disability discrimination with the Equal Employment Opportunity Commission (EEOC). The EEOC investigated her claim and determined that Channel Master had violated the ADA by refusing to accommodate Williams' disability, by discharging her due to that disability, and by its policy of terminating temporarily disabled employees who can not return to work after six months.

The district court granted summary judgment to Channel Master finding that as a matter of law, Williams was not entitled to relief under the ADA, NCHPPA, or on her common law claim of wrongful termination. The appeal followed.

II.

To establish a cause of action under the ADA, a plaintiff must demonstrate: "(1) that [s]he has a disability; (2) that [s]he is otherwise qualified for the employment or benefit in question; and (3) that [s]he was excluded from the employment or benefit due to discrimination solely on the basis of the disability." *Doe v. University of Maryland Medical Sys. Corp.*, 50 F.3d 1261, 1265 (4th Cir. 1995); *Tyndall v. National Educ. Ctrs.*, 31 F.3d 209, 212 (4th Cir. 1994); *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995).[1]

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[1] The district court improperly relied, *Williams*, 910 F. Supp. at 1131, on a proof scheme based on the approach

The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2). The ADA regulations and EEOC interpretive guidelines list a number of major life activities. *See* 29 C.F.R. § 1630.2(i) (1996) (caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working); 29 C.F.R. Pt. 1630, App. § 1630.2(i) (1996) (above activities plus sitting, standing, lifting and reaching).[2] Williams asserted that both lifting and working

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that the Supreme Court took in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). By readjusting burdens between the plaintiff and defendant, the *McDonnell Douglas* test is designed to circumvent a factual dispute over the reasons for discharge, and is therefore most appropriate when "the defendant disavows any reliance on discriminatory reasons for its adverse employment action." *Ennis v. National Ass'n of Bus. and Educ. Radio, Inc.*, 53 F.3d 55, 57-58 (4th Cir. 1995); *Barth v. Gelb*, 2 F.3d 1180,1185-87 (D.C. Cir. 1993), *cert. denied*, 114 S.Ct 1538 (1994). Here, the parties do not dispute that the reason that Channel Master did not permit Williams to return to her job was that her back injury prevented her from performing her assigned tasks without accommodation. The *McDonnell Douglas* "inferential proof scheme" is not appropriate when, as here, the reason for discharge is undisputed.

[2] The EEOC interpretive guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*

constituted major life activities that her impairment substantially limited.

The district court erred in two respects in analyzing whether Williams had established that she was disabled for purposes of the ADA. First, the court erred in failing even to address Williams' asserted lifting limitation. Secondly, and perhaps more fundamentally, it erred in suggesting that working is *not* a major life activity, and that the general foreclosure test must be used to determine if any other major life activity is "substantially limited." *See Williams*, 910 F. Supp. at 1131-33, 1136-37. The district court improperly described the regulatory language discussing working as a major life activity as "superfluous" and thus declared that "[w]hile some courts might entertain claims under the 'major life activity' of 'working,' this Court does not." *Id.* at 1136. In fact, working is a major life activity, *see Gupton v. Virginia*, 14 F.3d 203, 205 (4th Cir. 1994) (Rehabilitation Act); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 724-27 (5th Cir. 1995), and the general foreclosure test applies only to claims brought under the major life activity of working. *See Gupton*, 14 F.3d at 205 (applying general foreclosure test only to the major life activity of working); 29 C.F.R. § 1630.20)(3) ("With respect to the major life activity of *working*, the term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes . . . .") (emphasis in original).

However, Williams nonetheless failed to establish that she had a disability sufficient to trigger the ADA. To determine if an employee is disabled under the ADA, a court must evaluate not just whether an employee is

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Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (citations and internal quotation marks omitted).

restricted but whether she is "[s]ignificantly restricted" in performing a major life activity "as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.20)(1)(ii). A court may also consider the "nature and severity of the impairment," its "duration or expected duration" and any "permanent or long term impact." 29 C.F.R. § 1630.2(j)(2). Moreover, when the major life activity at issue is working, the "inability to perform a single, particular job does not constitute a substantial limitation;" in this circumstance "substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. . . ." 29 C.F.R. § 1630.20)(3) (emphasis omitted).

Like the Eighth Circuit, we hold, as a matter of law, that a twenty-five pound lifting limitation – particularly when compared to an average person's abilities – does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity. *See Aucutt v. Six Flags Over Mid-America,* 85 F.3d 1311, 1319 (8th Cir. 1996) (twenty-five pound lifting restriction did not "significantly restrict" major life activities).[3]

Even if an individual demonstrates she is disabled, the ADA requires her to establish that, "with or without reasonable accommodation, [she] can perform the essential functions of the employment position that [she] holds or desires." 42 U.S.C. § 12111(8). The employer must arrange "reasonable accommodation" unless doing so

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[3] Because we find that Williams does not qualify as a disabled individual under the ADA, we need not reach the district court's holding regarding the legality of the asserted Avnet policy.

imposes an "undue hardship." 42 U.S.C. § 12112(b)(5). In determining whether the failure to accommodate Williams was reasonable, the district court deferred almost entirely to Channel Master's judgment. The court held, as a matter of law, that if a proposed accommodation was not "obviously reasonable," or its reasonableness "is a matter of some serious dispute, courts should defer to the employer's business expertise." *Williams,* 910 F. Supp. at 1133. The employer's point of view should define "reasonableness," the district court explained, because otherwise the determination of what is reasonable would "authorize[ ] the reviewing court to engage in a subjective, legislative exercise." *Id.*

This approach was misguided. Courts are often asked to define reasonableness in various contexts; the standard of "reasonableness" is empty if "reasonable" means only "the employer's opinion." The district court's approach is particularly inappropriate in the summary judgment context, where a court must view evidence in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654 (1962)). By definition, the determination of reasonableness is an *objective* analysis, not a subjective one dominated by either party's concerns. In assessing objective reasonableness, the governing statute provides guidance. *See* 42 U.S.C. § 12111(9). It provides that "'reasonable accommodation' may include" a number of listed measures; obviously Congress considered these types of accommodations to be reasonable. Examples in § 12111(9)(B) include "job restructuring, . . . reassignment to a vacant position, [and] acquisition or modification of equipment or devices." Thus, the district court also erred in suggesting that a qualified ADA plaintiff can *never* rely

on reassignment to a vacant position as a reasonable accommodation.[4]

Although the district court erred in its mode of analyzing whether Channel Master's failure to accommodate Williams was reasonable, it nonetheless properly granted Channel Master summary judgment on the ADA claim because Williams failed to establish that she was disabled under the ADA.

III.

The district court also properly rejected Williams' two state law claims.

We note that the standards under the NCHPPA are narrower than under the ADA. *See* N.C. Gen. Stat. § 168A (Michie 1987); *Burgess v. Your House of Raleigh, Inc.*, 388 S.E.2d 134, 138 (N.C. 1990) ("[T]he North Carolina Act has a more restrictive definition of a 'handicapped person' in that it defines 'major life activities' more narrowly than the federal act defines the term."). Since Williams is not disabled for the purposes of the ADA, she similarly is not disabled for the purposes of the NCHPPA.

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[4] The district court relied on *Myers v. Hose*, 50 F.3d 278, 284 (4th Cir. 1995), as supporting its conclusion that reassignment to a vacant position can *never* be a reasonable accommodation in ADA cases. This conclusion is contrary to congressional direction and is in no way required by our *Myers* decision. *Myers* noted only that a particular accommodation does not become federally mandated merely because an employer "elects to establish it as a matter of policy." *Id.*

Finally, the district court concluded that William could not prevail on her common law claim of wrongful discharge in violation of public policy. The court found that without a legally cognizable disability, Williams could not claim that she was a victim of disability discrimination. We agree.

AFFIRMED

WILLIAMS, Circuit Judge, concurring:

I agree with the majority's reasoning and holding that Linda Williams is not disabled within the meaning of the Americans with Disabilities Act (ADA) and that the district court properly rejected Williams's state law claims. *See* Majority Op. at 4-6, 7. Having reached those conclusions, I would not reach the issue of reasonable accommodation as discussed in the majority's opinion in dicta on pages 6-7. *See Karsten v. Kaiser Foundation Health Plan,* 36 F.3d 8, 11-12 (4th Cir. 1994) (*per curiam*) (stating that alternative holdings should be avoided).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
December 23, 1996

No. 96-1072
CA-95-108-5-BO

LINDA WILLIAMS
Plaintiff-Appellant

v.

CHANNEL MASTER SATELLITE SYSTEMS, INCORPORATED; CHANNEL MASTER COMMUNICATIONS, INCORPORATED; AVNET, INCORPORATED
Defendants-Appellees

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; EQUAL EMPLOYMENT ADVISORY COUNCIL
Amici Curiae

O R D E R

Appellant has filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
APR 24 1997
OFFICE OF THE CLERK

(2)

No. 96-1521

In The Supreme Court Of The United States

OCTOBER TERM 1996

LINDA WILLIAMS,

Petitioner,

v.

AVNET, INC., CHANNEL MASTER COMMUNICATIONS, INC., and CHANNEL MASTER SATELLITE SYSTEMS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARTIN N. ERWIN
Counsel of Record for Respondents
SMITH HELMS MULLISS & MOORE, L.L.P.
300 N. Greene Street, Suite 1400
Greensboro, North Carolina 27401
(910) 378-5327

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Fourth Circuit. The opinion of the Court of Appeals is reported at 101 F.3d 346 (4th Circ. 1996) and is reproduced at page A-25 of the Petition.

The facts of the case, as recited by the Fourth Circuit,

are that the Plaintiff was injured in an automobile accident unrelated to her work; was unable to work for several months; was released by her physician to return to work with restrictions that prohibited lifting more than 25 pounds and pushing or pulling heavy objects; that the physician rated her impairment as 5% of the back; and that there were several jobs at the defendants' plant that the plaintiff could have performed with her restrictions. *Id.*, 101 F.3d at 348; Petition at page A-27.

Based on these facts, the Fourth Circuit held, in a *per curiam* opinion, that the plaintiff "failed to establish that she had a disability sufficient to trigger" the Americans with Disabilities Act, 42 U.S.C. § 1201, *et seq.* (The "ADA"), because, even if the plaintiff was restricted, she was not "severely restricted" within the meaning of the ADA and its implementing regulations, most notably, 29 C.F.R. § 1630.20 (1) (ii) and (3). The Court also held as a matter of law that "a twenty-five pound lifting limitation - particularly when compared to an average person's abilities - does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity." *Id.*, 101 F.3d at 349; Petition at pages A-30 and A-31.

The holding below is not "a decision in conflict with the decision of another United States court of appeals on the same

important matter" within the meaning of Rule 10(a) of the Rules of the Supreme Court. To the contrary, the case is a routine, *per curiam* opinion that does not, and could not, change the rule in the Fourth Circuit that the determination of disability must be individualized. *E.g., Ennis v. National Association of Business and Educational Radio*, 53 F.3d 55, 59 (4th Cir. 1995) (individualized determination of disability required); *Norfolk and Western Ry. Co. v. Director, OWCP*, 5 F.3d 777, 779 (4th Cir. 1993) (a panel of the court of appeals may not overrule another panel's decision). As acknowledged by the Petition, the Fourth Circuit's rule is in harmony with the rule established by the decisions of the courts of appeals in the other circuits. Petition at page 9.

Further, the factual recitations by the court of appeals pertaining to the plaintiff's minor disability ratings and to the jobs that she could perform even with her restrictions, as well as its holding that the plaintiff was not severely restricted, both make it clear that the court of appeals did, in fact, make an individualized assessment of the plaintiff's condition, notwithstanding its holding on lifting limitations. Hence, the opinion of the court of appeals is not at odds with the rule in the Fourth Circuit or in any other circuit.

For these reasons, the Respondents submit that the

petition for writ of certiorari should be denied.

Respectfully submitted,

MARTIN N. ERWIN
Counsel of Record for Respondents
SMITH HELMS MULLISS & MOORE, L.L.P.
300 N. Greene Street, Suite 1400
Greensboro, North Carolina 27401
Telephone: (910) 378-5327